UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL REGULATIONS

STATE REGULATIONS

FEDERAL REGISTER

MISCELLANEOUS

STATEMENT OF ISSUES PRESENTED

Should the Court reject the majority view and adopt Plaintiff's ("EPA" or "the Government") litigation position that the routine maintenance, repair and replacement provision should be narrowly construed and only apply to "*de minimis*" changes on a particular unit?

Detroit Edison's Answer: No.

Should the Court aggregate the three separate projects at issue into one project even though the Government alleged in its Notice of Violation they constituted separate "major modifications," the projects proceeded on different timetables, they were budgeted separately, they were approved separately, they were implemented under different work orders, and no one project required or depended upon another as technical or economical matter?

Detroit Edison's Answer: No.

Should the Court ignore the applicable regulations and adopt the Government's litigation position related to the statutory and regulatory "causation" requirement for determining whether a particular "major modification" has occurred?

Detroit Edison's Answer: No.

Should the Government bear the burden of proof in this enforcement action against Detroit Edison?

Detroit Edison's Answer: Yes

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

Nat'l Parks Conservation Ass'n, Inc. v. TVA, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010)

Pa. Dep't of Envtl. Prot. v. Allegheny Energy, Inc., No. 05-885, 2008 WL 4960100 (W.D. Pa. Sept. 2, 2008)

U.S. v. Ala. Power Co., 372 F. Supp. 2d 1283 (N.D. Ala. 2005)

U.S. v. Ala. Power Co., 681 F. Supp. 2d 1292 (N.D. Ala. 2008)

U.S. v. Ala. Power Co., No. 2:01-CV-152-VEH, 2011 WL 1158037 (N.D. Ala. Mar. 14, 2011)

U.S. v. Ala. Power Co., No. 2:01-CV-152-VEH, 2011 WL 1158252 (N.D. Ala. Mar. 14, 2011)

U.S. v. Am. Nat'l Can Co., 126 F. Supp. 2d 521 (N.D. Ill. 2000)

U.S. v. Duke Energy Co., 278 F. Supp. 2d 619 (M.D.N.C. 2003)

U.S. v. Duke Energy Corp., No. 1:00CV1262, 2010 WL 3023517 (M.D.N.C. July 28, 2010)

U.S. v. E. Ky. Power Coop., Inc., 498 F. Supp. 2d 976 (E.D. Ky. 2007)

U.S. v. Mead Corp., 533 U.S. 218 (2001)

Wisc. Elec. Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990)

INTRODUCTION

The Government has spent the last 12 years prosecuting a coal-fired power plant enforcement initiative premised on new interpretations contrary to the Clean Air Act ("CAA"), contrary to the regulatory text, and contrary to over two decades of EPA practice and guidance. Further, for much of those 12 years, EPA has failed to establish any consistency in how it interprets the applicable rules. Though the Government continues to prosecute this and other New Source Review ("NSR") actions, it does so based not upon longstanding views made known through notice-and-comment rulemaking but upon interpretations developed solely for litigation.

In response to various challenges to these lawsuits, several courts have analyzed the CAA, the NSR rules, and decades of EPA conduct and guidance. After comprehensive review, they have concluded the Government should not be permitted to reinterpret the rules and create tests that are not in those rules. *See, e.g.*, Doc. No. 15 at 8-12; Doc. No. 116 at 4-16 (discussing cases).[1] The Government asks this Court to reject these decisions and instead defer to its litigation positions. It also accuses Detroit Edison of "inject[ing] uncertainty into these proceedings by a process of selective memory." Doc. No. 117 at 1-2. Because the Government's motion largely ignores EPA's "statements in the *Federal Register*, its statements to the regulated community and Congress, and its conduct for at least two decades," Detroit Edison respectfully suggests that *the Government*—not Detroit Edison—is the party with "selective memory." *U.S. v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 637 (M.D.N.C. 2003) ("*Duke Energy I*").

The Government asks this Court to reject the majority view and adopt a "narrow" definition of RMRR. Doc. No. 117 at 7-13. As other courts have found, that is not the law. *See* Doc.

[1] These decisions are discussed in Detroit Edison's Memorandum of Law in Support of Its Motion to Establish the Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement ("RMRR"), which was filed on July 18, 2011. Doc. No. 116 ("Detroit Edison's RMRR Motion"). In responding to the Government's arguments here, Detroit Edison incorporates by reference the materials filed in support of Detroit Edison's RMRR Motion.

No. 116 at 4-16. As EPA said, whether repair or replacement of a particular type of equipment is routine "*must* be based on ... whether that type of equipment has been repaired or replaced by *sources within the relevant industrial category*." 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) ("WEPCo Rule") (emphasis added). Second, in an attempt to bolster its RMRR case, the Government asks this Court to treat the three separate projects at issue as one project. Doc. No. 117 at 13. That is not the law either. The relevant RMRR issue is not whether the combined economizer, reheater and waterwall projects qualify as RMRR, but rather whether each of them does. Third, the Government seeks a ruling that establishes the standard that will govern the "demand growth exclusion" but distorts the applicable rules related to the statutory and regulatory "causation" requirement. *Id.* at 14-20. Finally, despite the fact the Government brought this action alleging that Detroit Edison undertook "major modifications," it contends that Detroit Edison bears the burden of proof to demonstrate that the projects at issue were *not* "major modifications." This argument is flawed as well. The Government's motion for partial summary judgment should be denied in its entirety.

ARGUMENT

I. THE COURT SHOULD FOLLOW THE MAJORITY RULE ON RMRR, NOT THE GOVERNMENT'S LITIGATION POSITION.

The Government asks this Court to adopt a "narrow" definition of RMRR such that only *de minimis* changes qualify as RMRR. Doc. No. 117 at 8. The Government claims EPA has consistently applied this interpretation since the 1970s, and that RMRR "covers only those activities that are routine for individual units." *Id.* at 8 n.6 and 9. Detroit Edison's RMRR Motion explains why these arguments lack merit. Doc. No. 116. In short, until it began its enforcement initiative in 1999, EPA used an industry standard for determining what types of activities were RMRR. During the EPA rulemaking in which the agency clarified how NSR should be applied following the Seventh Circuit's decision in *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir.

1990) ("*WEPCo*"), EPA confirmed the proper standard for RMRR:

> EPA is today clarifying that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, *must* be based on the evaluation of *whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.*

57 Fed. Reg. at 32,326 (emphasis added).

The weight of authority—including the most recent court decisions on the issue—has relied on the WEPCo Rule preamble and other EPA statements to adopt the "routine in the industry" standard and reject the more narrow standard urged by the Government. Doc. No. 116; *see U.S. v. Duke Energy Corp.*, No. 1:00CV1262, 2010 WL 3023517, at *7 (M.D.N.C. July 28, 2010) ("*Duke Energy IV*") ("EPA is bound by its own interpretation of the PSD regulations, which have consistently referenced industry standards."); *Nat'l Parks Conservation Ass'n, Inc. v. TVA*, No. 3:01-CV-71, 2010 WL 1291335, at *24 (E.D. Tenn. Mar. 31, 2010) ("*NPCA v. TVA*") ("The [c]ourt answers the question of whether these projects are 'routine' within the meaning of the [RMRR] exclusion ... by examining projects in both the industry as a whole and at [the unit] in particular."); *U.S. v. Ala. Power Co.*, 681 F. Supp. 2d 1292, 1312 (N.D. Ala. 2008) ("*Alabama Power I*") (applying WEPCo factors "with reference to the industry as a whole, not just the particular unit at issue."); *Pa. Dep't of Envtl. Prot. v. Allegheny Energy, Inc.*, No. 05-885, 2008 WL 4960100, at *5, 7 (W.D. Pa. Sept. 2, 2008) (adopting standard of courts that "have not accorded deference to the EPA's narrow interpretation of RMRR due to the agency's conflicting guidance on the issue after *WEPCO*," but instead comporting with "EPA's original interpretations of RMRR"); *U.S. v. E. Ky. Power Coop., Inc.*, 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007) ("*EKPC*") ("Looking at all of the factors outlined in *Mead* with respect to the 'fair measure of deference' to be afforded to an agency administering its own regulations," the court adopts RMRR standard "with reference to the industry as a whole, not just the particular ... unit at issue.").

The Seventh Circuit in *WEPCo* also assessed the project at issue by comparing it to other projects in the utility industry. In describing the proposed project as a "highly unusual, if not unprecedented," the court evaluated the project by looking at the *utility industry* as a whole: "WEPCo did not identify, and EPA did not find, even a single instance of renovation work at *any electric utility generating station* that approached the Port Washington life extension project in nature, scope or extent." *WEPCo*, 893 F.2d at 911 (emphasis added).

A. The Government's Interpretation that only "*De Minimis*" Activities Qualify as RMRR is Not a Longstanding One.

The Government asks this Court to disregard the WEPCo preamble and the majority view, primarily relying on two decisions from the D.C. Circuit. Doc. No. 117 at 8-9. But neither supports the Government's position. First, the decision in *Ala. Power Co. v. Costle*, 636 F.2d 323 (1979), does not even discuss the RMRR provision, much less define the types of projects that do or do not qualify as RMRR. Second, while *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*"), does contain *dicta* regarding the court's mistaken understanding that EPA applied a *de minimis* rationale to RMRR, the court did not hold that a project that is RMRR must be *de minimis*. Rather, it "express[ed] no opinion regarding EPA's application of the *de minimis* exception ...." *Id.* at 888. The Government then corrected the court's mistake regarding EPA's stance on RMRR, stating EPA has historically interpreted "the RMRR exclusion" as "exclud[ing] at least some non-*de minimis* activities from NSR and NSPS.... Thus, *the Panel's statement that the RMRR exclusion is limited to de minimis changes or those that result in de minimis emission increases ... is in error.*" EPA's Pet. for Reh'g or Reh'g *En Banc*, *New York v. U.S. EPA*, No. 03-1380, 2006 WL 1547034 (D.C. Cir. May 1, 2006) (emphasis added).[2] Con-

[2] In the preamble to a 2003 rulemaking, EPA likewise stated that it historically "did not consider the terms 'modification' or 'change' to cover everything other than *de minimis* activities." 68 Fed. Reg. 61,248, 61,272 (Oct. 27, 2003). Nevertheless, EPA said that "some of the case-by-case determinations [it has] made, *particularly over the past decade*, and *particularly in a series of enforcement actions*, have been criticized for giving the [RMRR] exclusion a narrow scope

trary to its current position, EPA also described *New York II* as "stand[ing] in flagrant opposition to *Chevron*" and "egregiously" wrong. EPA's Pet. for Writ of Cert., *U.S. EPA v. New York*, No. 06-736, 2006 WL 3419830 (U.S. Nov. 27, 2006). Nor was *New York II* followed by the five district courts adopting a "routine in the industry" standard after it was decided. *See, e.g., Alabama Power I*, 681 F. Supp. 2d at 1308-09 ("EPA misses the point when it quotes *New York II's* language about RMRR being historically narrowly defined"); *Duke Energy IV*, 2010 WL 3023517, at *2-3.[3] For the same reasons, the *dicta* in *New York II* should not be followed here.

B. EPA's "Applicability Determinations" Do Not Evidence a Longstanding Interpretation.

The Government next points to twelve "applicability determinations" that it claims demonstrate EPA has consistently applied the RMRR provision narrowly since the 1970s (Doc. No. 117-4); however, half of these determinations post-date 1997 (the start of the enforcement initiative), and simply rehash the Government's enforcement litigation position. They are not entitled to deference. *See, e.g., Duke Energy I*, 278 F. Supp. 2d at 630 n.8 ("Both [the EPA Environmental Appeals Board ("EAB") Final Order and Detroit Edison Applicability Determination] decisions ... were issued following the EPA's decision in 1999 to initiate a number of enforce-

---

that disallows replacement of significant plant components with identical or functionally equivalent components." *Id.* at 61,250 (emphases added). EPA intended the 2003 revised rule to be "a change from the approach [it has] taken *in the recent past*." *Id.* at 61,270 (emphasis added).

[3] The Government cites *Duke Energy IV* as if it supports its view of RMRR. Doc. No. 117 at 11. To the contrary, *Duke Energy IV* resulted from EPA's effort to vacate *Duke Energy I* following *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007). In support of its motion to vacate, EPA made the same arguments it makes here, acknowledging *Duke Energy I* "rejected EPA's interpretation of the regulatory 'routine maintenance' exclusion." Amended Mem. of Law in Supp. of Pl.s' Mot. to Vacate at 1, *U.S. v. Duke Energy Corp.*, No. 1:00-cv-01262, 2007 WL 4728851 (M.D.N.C. Nov. 2, 2007); *see also id.* at 8 (*New York II* "confirms that regulatory exemptions from the broad statutory term 'any physical change' *must* be narrow, given the broad statutory mandate that PSD apply to 'any physical change' that increases emissions."). *Duke Energy IV* rejected these arguments, holding "EPA is bound by its own interpretation of the PSD regulations, which have consistently referenced industry standards." 2010 WL 3023517, at *7.

ment proceedings. ...[G]iven the potentially self-serving nature of these decisions, they do not evidence a long-standing interpretation."). In the 2000 Detroit Edison applicability determination, for example, the five factors EPA first set forth in the 1988 WEPCo determination suddenly mushroomed into twenty factors. Doc. No. 117-17. Those new factors included nonsensical factors such as whether the projects were performed during a planned outage, required the use of outside contractors, required approval beyond plant personnel, and were capitalized. *Id.* After a recent bench trial on the RMRR issue, the court in *NPCA v. TVA* rejected the Plaintiff's reliance on those factors in finding tube replacement projects like those at issue here RMRR:

> Shutting down a unit, even for a number of weeks, in order to work on the unit is a regular occurrence in the utility industry. So is hiring outside contractors to perform that work, seeking and obtaining approval beyond plant management for that work, and capitalizing the costs associated with that work. ... The [c]ourt is thus not persuaded that facts like these compel the conclusion that a project falls outside the scope of the RMRR exception.

2010 WL 1291335 at *27-34 (finding economizer and reheater replacements RMRR).[4]

The Government cites a 1975 memo from an EPA lawyer as evidence of longstanding interpretation. Doc. No. 117-5. But that memo involved installation of a steam generator—new equipment not previously installed at the site—and the addition of tubing to the boiler to expand the installed capacity of the boiler to service the new generator. *Id.* The memo did *not* say replacement projects commonly undertaken to maintain reliability like those at issue here were non-routine. The 1987 Casa Grande letter involved the restart of a plant that had been shut down

[4] The Government's reliance on an order issued by the EAB in 2000 is misplaced. Doc. No. 117 at 11. The Eleventh Circuit rejected that order as a "patent violation of the Due Process Clause," *TVA v. Whitman*, 336 F.3d 1236, 1258-59 (11th Cir. 2003), declaring it "legally inconsequential." *Id.* at 1239-40. In addition, *In re Monroe Elec. Generating Plant Entergy Louisiana, Inc. Proposed Operating Permit*, Petition No. 6-99-2 (EPA June 11, 1999) (Doc. No. 117-9), cannot be considered evidence of a longstanding interpretation since it was issued in 1999, shortly after EPA's enforcement initiative. In any event, *In re Monroe* did "not reach a final conclusion" on whether the particular projects "should be considered routine." *Id.* at 22.

for 10 years. Doc. No. 117-10. EPA concluded the rehabilitation work needed to restart the boiler after 10 years was non-routine because "numerous items of repair, as well as replacement *and installation of new equipment*, are needed in order for the ... plant to begin operation." *Id.* at 6 (emphasis added). Like the 1975 memo, the Casa Grande letter states that rehabilitation and installation of new equipment at a long-dormant facility is non-routine. It did *not* say replacement projects commonly undertaken in the industry to maintain reliability were non-routine.

The Whitmore letter—issued in 1989 shortly after EPA's WEPCo determination—says nothing about the scope of the project at issue and recognized that the applicable standards were subject to the Seventh Circuit's decision in *WEPCo*, which was then pending. Doc. No. 117-12 at 1. EPA advised Minnesota regulators in 1995 in the Miller letter that replacing "the existing atmospheric burners (two in each boiler) with a matrix of 30 burners" was not RMRR. Doc. No. 117-11 at 1. That project is nothing like the like-kind replacements at issue here. Nor is it like the countless other replacement projects that EPA never claimed triggered NSR until 1999.

The Government relies on the 1988 Clay Memo as establishing the alleged "narrow" scope of the RMRR provision. Doc. No. 117 at 7, 9-14. But the Clay Memo can only be understood in the context of the project at issue and the events and EPA statements that came after it. Prior to the enforcement initiative, EPA determined only one power plant had been changed so radically that it triggered NSR—the "massive" and "unprecedented" WEPCo life extension project addressed in the Clay Memo. After the Clay Memo in 1988, EPA did nothing for more than a decade to challenge the routineness of "life extension" projects EPA knew were common in the industry. *See, e.g., Duke Energy I*, 278 F. Supp. 2d at 636 n.13 (noting EPA's awareness of life extension projects since the 1980s). As the court in *Alabama Power I* observed:

> This court believes it is superficial and insufficient to quote the Clay Memorandum and say it forecloses all further discussion. The EPA continued to publish statements about enforcement and RMRR after the Clay Memorandum. Those statements did not occur in a vacuum; the court believes the EPA meant

> what it said when it called the modifications in WEPCO extraordinary and that the EPA did not anticipate bringing additional enforcement actions because of WEPCO. The fact that years passed before it did so speaks for itself. The electric utility industry was reading what the EPA was publishing, *e.g.*, EPA's response to Congressman Dingell's "inquiry."[5]

681 F. Supp. at 1309; *see also* Doc. No. 116 at 6 (describing Dingell inquiry).

Likewise, the Government in this case could not identify a single instance where EPA determined before 1999 that the replacement of waterwalls or a pendant reheater—two of the projects at issue in this case— triggered NSR. U.S Resp. & Objections to Detroit Edison's First Set of Req. for Admis. at 5-6 (July 13, 2011) (excerpts attached as Ex. 2). In its 2004 review of Michigan's NSR program, EPA acknowledged that Michigan followed the "routine in the industry" standard, which EPA claimed was "not consistent with [its] policy" as "*recently expressed in utility enforcement actions*." Doc. No. 58-5 at 18 (emphasis added and parentheses omitted). The Government's claim of a longstanding narrow interpretation is neither supported by the "applicability determinations" nor the Government's enforcement history.

C. The Court Should Not Defer to the Government's Litigation Position.

Because the Government's positions on the meaning and application of the NSR rules changed so abruptly in 1999, utilities and several states have challenged the NSR enforcement initiative as an improper effort to revise the NSR program. *See, e.g.*, Doc. No. 15 at 8-10. But even after it changed course in 1999, the Government still did not have its story straight about how EPA was supposed to apply the NSR program to utilities. Tracing the history of EPA's statements on the RMRR provision since 1999 can be a dizzying exercise.

---

[5] In October 1990, Congressman Dingell formally asked EPA about *WEPCo* amid concerns that the decision could apply to projects routinely undertaken in the industry. EPA reassured Congressman Dingell that it would not, stating that "it is expected that most utility projects will *not* be similar to the WEPCO situation," and that "the [*WEPCo*] ruling is not expected to significantly affect power plant life extension projects." W. Rosenberg letter to J. Dingell at 5-6 (June 19, 1991) (emphasis in original) (Ex. 1). The WEPCo Rule in 1992 thereafter codified EPA's view that the correct standard for whether repair or replacement is routine "*must* be based on … the relevant industrial category" and not "the unit." 57 Fed. Reg. at 32,326 (emphasis added).

- Just months after EPA commenced its enforcement initiative, EPA's enforcement chief conceded that "when you get into [the] question of what's routine, you can find a *substantial* gray area." Transcript of American Bar Association Update re Clean Air Act, Part 2 at 50:9-11 (May 23, 2000) (emphasis added) (Doc. No. 15-12). Not surprisingly, he characterized EPA's utility enforcement initiative as "[p]erhaps ... *reinvented enforcement*." *Id.* at 40:4-5 (emphasis added).

- The Government asserted in 2002 "[w]hether a replacement is 'common in the industry' is *irrelevant* to whether a replacement is routine, *Duke Energy*, supra, U.S. Resp. to Duke's First Req. for Admissions at 47 (Dec. 12, 2002) (emphasis added) (Doc. No. 15-13), despite that EPA explained in the *Federal Register* ten years earlier the RMRR case-by-case inquiry "*must* be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the *relevant industrial category*." 57 Fed. Reg. at 32,326 (emphasis added).

- Despite its clear *Federal Register* guidance requiring the use of an industrial category test, the Government stated that it did not "perform *any analysis* of whether certain projects it became aware of as part of *this enforcement initiative* [were] common in the industry as a whole." *Duke Energy, supra*, United States' Opp'n to Duke's Mot. to Determine Sufficiency of Pl.'s Resp. to Duke's First Req. for Admissions at 10 (Aug. 4, 2003) (Doc. No. 15-14) (emphasis added).

- A year later, the Government stated quite differently that "EPA has *long considered industry practice* ... under the interpretation of its routine maintenance exclusion that the United States relies on in this litigation." *Alabama Power I, supra*, United States Reply Regarding the Correct Legal Tests at 55 (Oct. 28, 2004) (Doc. No. 15-15) (emphasis added).

- In 2007, the Government reversed course again, asserting that "EPA did not analyze whether similar projects were common in the industry as a whole" in connection with the enforcement litigation. *Duke Energy*, supra, United States' Mem. In Supp. of Mot. to Vacate at 12 (Oct. 4, 2007) (Doc. No. 15-16).

- In 2003, the Government stated that the CAA "itself *does not mandate* the narrow construction" of RMRR, *U.S. v. Illinois Power Co.*, No. 99-833 (S.D. Ill.), Pl.'s Reply to Defs' Findings of Fact & Conclusions of Law at 3-4 (Sept. 5, 2003) (emphasis added) (Doc. No. 15-17), but now takes the opposite view that the CAA "*compels* a narrow reading" of RMRR (Doc. No. 117 at 8) (emphasis in original).

The Government has been equally inconsistent in how it characterizes the purposes of the NSR program. It claims in this case that "NSR is a tool to *reduce* pollution from individual sources." Doc. No. 8 at 1 (emphasis added). It claimed in another case that "the purpose of the NSR provisions is not to compel *reductions* from existing sources, but to limit *increases* result-

ing from physical or operational changes." See Br. for Resp. EPA at 73-74, *New York v. U.S. EPA*, No. 02-1387, 2004 WL 5846436 (D.C. Cir. Oct. 26, 2004). Given the Government's flip-flops, one court characterized the NSR enforcement initiative as a "sport, which is not exactly what one would expect to find in a national regulatory enforcement program." *United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1306 n.44 (N.D. Ala. 2005).

"The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). An essential predicate to deference is that the agency's position be a settled interpretation, while an agency that vacillates between positions receives no deference. *Id.* at 228 n.8; *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30 (1987). "When an agency waffles without explanation, taking one view one year and another the next, ...[c]ourts are correspondingly less willing to accept the agency's latest word as authoritative; maybe it is no better and no more enduring that the last warble." *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987).

As shown above and in Detroit Edison's RMRR Motion, the Government's current litigation position on RMRR deserves no deference because it has "take[n] an inconsistent view of the regulations, ma[de] inconsistent statements with respect to the regulation, and also enforce[d] the regulation with no discernable consistency." *EKPC*, 498 F. Supp. 2d at 993. The agency's "zigs and zags represented by its contradictory... statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice, on this issue" fatally undermine its claim for deference. *Ala. Power*, 372 F. Supp. 2d at 1306; *U.S. v. Am. Nat'l Can Co.*, 126 F. Supp. 2d 521, 525 (N.D. Ill. 2000) ("no deference is due when an agency has not formulated an official interpretation but is merely advancing a litigation position"). The Court should reject the Gov-

ernment's litigation position, deny its motion for summary judgment, and adopt the RMRR standard requested in Detroit Edison's RMRR Motion, consistent with the majority view.[6]

D. The Government Bears the Burden of Proof on RMRR.

The Government bears the burden of proof to show a physical or operational change. The regulations define "physical or operational change" only in terms of what is not included. "A physical change ... shall not include ... [r]outine, maintenance, repair or replacement." 40 C.F.R. §52.21(b)(2)(iii)(a). RMRR is not, therefore, an exemption to an otherwise covered activity; it is an exclusion that defines what is a "change." EPA demonstrated this in the 1980 NSR preamble, discussing RMRR not in the section entitled "*De minimis* Exemptions," but in the section entitled "Final Definition of 'Major Modification' and 'Net Emissions Increase.'" 45 Fed. Reg. 52,676, 52,705-06, 52,698 (Aug. 7, 1980). It explained, "[w]hile the new PSD regulations do not define 'physical change' or 'change in the method of operation,' they provide that those phrases do not encompass specific types of events. Those types are: (1) [RMRR] ...." *Id.* at 52,698. To prevail, therefore, the Government must prove the regulatory definition of "physical or operational change" applies to each project at issue, *i.e.*, that each project is *not* RMRR.[7]

II. THE COURT SHOULD REJECT EPA'S EFFORT TO AGGREGATE THREE SEPARATE PROJECTS INTO ONE PROJECT.

The Government asserts the Court should aggregate the three separate projects at issue

---

[6] As Detroit Edison has noted, the *Ohio Edison* case on which the Government relies has been rejected by the many courts that have adopted the "industrial category" standard enunciated by EPA in the *Federal Register*. *See, e.g.,* Doc. No. 116 at 16-18.

[7] Detroit Edison disagrees with the courts holding otherwise (*see* Doc. No. 117 at 5 n.5) but notes that courts have shifted the burden to the defendant utility to show that the activities were RMRR only when the Government first proves those activities caused an emissions increase. *See, e.g., EKPC*, 498 F. Supp. 2d at 995 ("The EPA will have to prove that there was a 'modification' — i.e., a physical change that resulted in a net emissions increase. Once that is proven, the burden shifts to EKPC to prove that its activities are exempt from the definition of 'modification' because they were routine."); *Alabama Power I*, 681 F. Supp. 2d at 1312-13 (same). Should the Court disagree that the Government has the burden to show the projects at issue were not RMRR, the Court should adopt that same standard here.

here into one project for purposes of applying the RMRR provision. Doc. No. 117 at 13-14. These arguments were largely considered and rejected by the Court when it granted Detroit Edison's motion for protective order. Doc. Nos. 81, 85, 92 and 104. There, Detroit Edison opposed the Government's efforts to characterize the work performed during the 2010 outage as a single "modification." Rather, as described in its Notice of Violation ("NOV"), the parties' Rule 26(f) Report, and elsewhere, the Government focused on three projects, alleging each was a separate "major modification" undertaken in violation of NSR. *See, e.g.*, Doc. No. 81-2 at 4 ("EPA has calculated that the replacement *projects* identified in Paragrpah [sic] 20 are major *modifications* under the Clean Air Act and the Michigan implementing regulations, as they will result in projected emission increases in excess of 40 TPY of NO_x and SO_2.") (emphases added).

In granting Detroit Edison's motion for protective order, the Court limited discovery to "the *projects* specifically identified in Plaintiffs' [NOV]." Doc. No. 104 (emphasis added). The Government neither objected to nor sought clarification of that Order correctly identifying the work at issue as separate projects. Moreover, if the Government intended to treat the separate projects done during the May 2010 Unit 2 outage as a single project, it was obligated to say so in its NOV. Doc. No. 81 at 8-18; Doc. No. 92. The Government did not do so. Doc. No. 81-2 at 4.

The Government nonetheless maintains that the projects should be considered one project because they "w[ere] undertaken at the same time as a part of a single effort." Doc. No. 117 at 13. The Government fails to cite any regulation or guidance establishing such a standard. In stark contrast to its current position, EPA stated in 2003 that "under [its] current policy of aggregation, two or more replacement activities that occur at the same time are not automatically considered a single activity solely because they happen at the same time." 68 Fed. Reg. at 61,258. Rather, "[f]urther inquiry into the nature of the activities and their relationship to each other is needed before deciding whether the activities must be aggregated under NSR." *Id.* EPA re-

cently confirmed this policy through a Rule 30(b)(6) witness in another NSR case:

> [T]he main point there on timing is that there was no presumption that -- that changes being made at the same time, during the same time period, are necessarily dependent on one . . . [an]other. ... you can't draw a conclusion just from that fact. You have to go further and look at the technical and economic factors involved in the specific case.

Transcript of 30(b)(6) Deposition of Michael J. Sewell at 203-04, *United States v. Ky. Utils. Co.*, No. 5:07-CV-0075-KSF (E.D. Ky. July 10, 2008) (excerpts attached as Ex. 3).

Aggregating the three separate projects at issue here is not appropriate because—in addition to the reasons above—the projects were neither economically nor functionally dependent. 71 Fed. Reg. 54,235 (Sept. 14, 2006). Nor were they treated as one for financial purposes. The economizer, reheater and waterwall projects proceeded on different timetables; were budgeted separately; were approved separately; and no one project required or depended on another. *See, e.g.*, Doc. No. 46-10 at 63; Supplemental Expert Report of J. Golden at 16 (June 3, 2011) (excerpt filed under seal as Ex. 4). The Court should deny the Government's motion for summary judgment, and treat the three projects as separate projects just as EPA did in its NOV. *See, e.g., NPCA v. TVA*, 2010 WL 1291335 (analyzing same outage economizer and superheater projects separately for purposes of RMRR).[8]

III. THE GOVERNMENT SEEKS THE WRONG STANDARD FOR CAUSATION.

The Government's discussion of Michigan's rules setting forth EPA's burden to prove that the projects have actually caused a significant net emissions increase is mostly platitudes. The Government describes in general terms what the rules say but does not explain how it thinks the rules should apply to the facts of this particular case. Unlike Detroit Edison's motion for

[8] Alternatively, the Court should deny the Government's motion for summary judgment on the issue of aggregation if it determines "[f]urther inquiry into the nature of the activities and their relationship to each other is needed before deciding whether the activities must be aggregated under NSR." 68 Fed. Reg. at 61,258. At a minimum, such further inquiry is needed to resolve a genuine issue of material fact as to whether the separate projects should be aggregated.

summary judgment under the 2002 NSR Reform Rules, which addresses a purely legal issue (*i.e.*, whether the Government can show that a major modification has occurred, when it is undisputed that there has been no actual increase in emissions following the project), the Government's motion asks the Court to opine on questions that ultimately will be mixed questions of law and fact, without discussing the facts. The Court should reject the Government's invitation to address these questions in a vacuum. Of course, should the Court grant Detroit Edison's motion, the case would end and the Court need not address the Government's motion at all.

A. Under Michigan's Rules, Whether a Major Modification Has Occurred Depends on Actual Data, Not the Accuracy of Projections.

As Detroit Edison explained in its motion for summary judgment based on the 2002 NSR Reform Rules (Doc. No. 107), where a company has filed a pre-project NSR notice that no emissions increase is projected to result from a project, the question whether a "major modification" has occurred depends on what actual post-construction emissions data show. The rules are clear: A project is a major modification "if it causes both ... [a] significant emissions increase [and] [a] significant net emissions increase." MICH. ADMIN. CODE R. ("MACR") 336.2802(4)(a); 40 C.F.R. § 52.21(a)(2)(iv). A project "is *not* a major modification if it *does not cause* a significant emissions increase." *Id.* (emphases added). Preconstruction projections do not determine NSR liability: *"Regardless of any such preconstruction projections,* a major modification results if the project *causes* a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*) (emphases added); MACR 336.2802(4)(b). To the extent the Government's motion contends that the accuracy of preconstruction projections dictates whether a major modification has occurred, it should be denied. As explained in Detroit Edison's motion for summary judgment, both EPA and MDEQ recognize that preconstruction projections showing no increase in emissions caused by a project could prove inaccurate. *See, e.g.*, Doc. No. 107 at 13; Doc. No. 119 at 5-7. But that is not a basis for liability. *Id.* Liability depends on whether

an observed increase in emissions actually was *caused* by the project. If so, the project is a major modification, and the operator could be subject to NSR permitting or liability at that time.[9]

The Government also observes the rules require operators to document their preconstruction determinations. Doc. No. 117 at 18-19. Detroit Edison agrees. There is no dispute Michigan's rules require an operator to document its projection of business activity and to describe the basis for excluding emissions unrelated to the project. But as Detroit Edison noted in connection with its motion for summary judgment, the company has done so and, furthermore, the Government did not allege in its NOV or in its Complaint that Detroit Edison violated any of these requirements. Doc. No. 119 at 9. Nor has EPA pointed to any provision in the Michigan rules imposing a specificity requirement with which Detroit Edison has failed to comply. *Id.* at 9-10, n.5.

B. Michigan's Rules Allow for the Exclusion of Emissions Caused by Unrelated Factors That "Physically and Legally" Could Have Been Accommodated During the Baseline Period.

The parties generally agree on the standard that governs whether a project has in fact caused an emissions increase. Specifically, "that portion of the unit's emissions following the project that [the] unit could have accommodated" during the baseline period "shall" be excluded,

---

[9] Footnote 14 of the Government's brief asks the Court to ignore one of the key differences between the 2002 NSR Reform Rules and the previous rules, arguing that the phrase "resumes regular operations" in the current rules is "substantively identical" to the phrase "normal source operations" in the 1992 Rules. EPA counsel apparently forgot to read the preamble of the 2002 rules, which stated the exact opposite:

> We do make use of the term "resumes regular operations" (as opposed to "normal operations") in the final [2002] rule, but that term has a very different meaning and we are using it for an entirely different purpose. Specifically, we are not using the term for purposes of determining whether a change results in a significant emissions increase. Rather, we use it only to identify the date on which the owner or operator must begin tracking emissions of changed units when using the actual-to-projected-actual method.

67 Fed. Reg. 80,186, 80,194 & n.16 (Dec. 31, 2002) ("2002 NSR Reform Rules"). So determinations like *In re: Wis. Power & Light Columbia Generating Station*, Petition No. V-2008-1, 2009 WL 7513860 (Oct. 8, 2009), which specifically relied on the concept of "normal source operations" under the 1992 rules are irrelevant under the 2002 Rules.

provided the emissions "are also unrelated to the particular project." MACR 336.2801(ll)(ii)(C). In the preamble of the 1992 and 2002 NSR rules, EPA explains that this provision implements the *statutory* causation requirement, and provides guidance for each prong. *See, e.g.,* 57 Fed. Reg. at 32326-28 ("NSR will not apply unless EPA finds that there is a causal link between the proposed change and any post-change increase in emissions."). The Government here—for the first time—adds a new gloss on the "capable of accommodating" prong of this test, and it elides an important nuance in the test for determining whether an increase is related to a project.

1. The Rules Require the Exclusion of Emissions that Could Have Been "Physically and Legally" Accommodated During the Baseline Period.

The Government argues that an operator cannot "exclude all of the projected emissions increases based only on the unit's physical or legal emissions limitations that applied during the baseline." (Doc. No. 117 at 17 (citing Letter from D. McNally (EPA Region III) to M. Wejkszner (Pa. Dep't Envtl. Prot.) (Apr. 20, 2010) ("Northampton")). Instead, the Government suggests that "the analysis must be based on the unit's *actual* projected operating conditions." *Id.* In support of this new gloss on EPA's longstanding guidance, the Government cites only Northampton, a very recent applicability determination of extremely limited value.

The Government's motion does not explain how this new gloss or the specific determination made in Northampton applies here. So Detroit Edison and the Court are left to guess as to the specific legal rule the Government seeks to impose. And this is critical, because Northampton articulates fairly unexceptional principles relating to the "capable of accommodating" analysis. First, Region III articulated EPA's longstanding guidance that emissions can be excluded from projected actual emissions only where they "could have been legally and physically accommodated before the project and are unrelated to the project." Northampton at 3. Second, Region III explained that, when assessing the unit's physical and legal capability during the baseline period, one must account for the unit's projected operations. *Id.* at 4. As explained in

Michigan's PSD Workbook, "[e]missions that could have been accommodated . . . are the level of emissions from the pre-modified emission units operating at the projected level of business activity." MDEQ PSD Workbook at 4-5. So, for example, if a unit had an availability of 85.5% in the baseline period, and its projected level of business activity is 82%, then it was clearly able physically to accommodate that level of activity in the baseline period, regardless of the project..

While these conclusions are unexceptional, the Government's extrapolation of them flies in the face of EPA's longstanding guidance. The Government suggests that, where a unit is utilized at one level during the baseline period but projects to be utilized more in the projected period due to factors, such as demand growth, that are unrelated to the project, the emissions increase cannot be excluded, notwithstanding that the unit was physically and legally capable of accommodating that level of utilization in the baseline period. Doc. No. 117 at 17-18. Northampton stands for no such proposition. And for good reason—EPA squarely rejected that approach when it promulgated the 2002 NSR Reform Rule:

> We believe that an increase in utilization should not trigger the major NSR requirements unless it is related to a physical or operational change. ... Under today's final rules, you may exclude emissions related to an increase in utilization if you were able to accommodate the increase in utilization during the 24-month period you select to establish your baseline actual emissions and the increased utilization is not related to the change.

67 Fed. Reg. at 80,203.[10] So to the extent the Government reads Northampton to say an increase in utilization due to factors unrelated to the project that the unit was physically and legally capable of accommodating during the pre-project period cannot be excluded, it is not supported by the plain language of the rules and is contrary to EPA's express intent in adopting them.[11]

---

[10] *See also* EPA, *Technical Support Document for the PSD and Nonattainment Area NSR Regulations* at II-3-13 (Nov. 2002), *available at* http://www.epa.gov/NSR/documents/nsr-tsd_11-22-01.pdf; 57 Fed. Reg. at 32,326 ("Under today's rule, during [the] baseline period ..., the plant must have been able to accommodate the projected demand growth physically and legally even absent the particular change.").

[11] In addition, Northampton is not a rule and is not binding on EPA, much less this Court. It

2. The Rules Do Not Require Emissions to Be Caused "Entirely" By Independent Factors.

The Government next argues that "a source may exclude only that *portion* of the unit's post-project emissions that is *entirely attributable* to a projected increase in capacity utilization that is unrelated to the change." Doc. No. 117 at 16-17 (second emphasis added). Again, the Government does not explain how this test would apply to the specific facts here. But to the extent the Government is contending the "relatedness" prong is not satisfied where any portion of a unit's emissions (as opposed to emissions *increase*) can be attributed to the project, it is wrong.

In promulgating the WEPCo Rule, EPA explained the statutory and regulatory causation test not as an "entirely unrelated to the change" standard, but as a "predominant cause" standard in the case of emissions that might have multiple causes. Where the projected increase could have been accommodated, EPA responded to the concern that "it may be very difficult to determine when an increase is caused by independent factors and when it is caused by the physical change," especially in "the presence of other necessary — but not of themselves sufficient — factors such as demand growth," by stating that "[i]f efficiency improvements are the *predominant cause* of the change in emissions and demand growth is not, the exclusion does not apply." 57 Fed. Reg. at 32,327 (emphasis added). Under this standard, if the project is not the "predominant cause" of an emissions increase, the increase must be excluded from post-change emissions.

The Court need not reach this issue if it grants Detroit Edison's summary judgment motion. If it does not, EPA's motion on this issue should be denied for these reasons as well.

---

is a very recent letter, issued after the start of the projects here, by an EPA regional office (and not one relevant to Michigan), that, as interpreted by EPA counsel, appears to be adding a gloss onto the rules that is not reflected in their text or EPA's contemporaneous statements in the preambles of the rules. Assuming this letter can be said to reflect EPA's view, the Court should reject it because "[o]therwise, the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking" in the guise of "interpretation." *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997).

IV. THE GOVERNMENT HAS THE BURDEN TO PROVE THE PROJECTS AT ISSUE CAUSED A SIGNIFICANT NET EMISSIONS INCREASE.

One of the bedrock principles of the NSR program is that—in order for a "major modification" to be proven—EPA must show the change *caused* a net emissions increase; that is, there must be a direct causal link between the change and any subsequent emissions increase, and the Government must prove it. "NSR will not apply *unless EPA finds* that there is a causal link between the proposed change and any post-change increase in emissions." 57 Fed. Reg. at 32,326 (emphasis added); *see id.* at 32,327 (The "causal link" requirement is "*a requirement of the pre-existing statutory and regulatory scheme.*") (emphasis added). The "demand growth" provision is not a regulatory "exception." It is EPA's implementation of the statutory "causal link" requirement. *See id.* at 32,326-28 (discussing demand growth provision under the heading "*The Causation Requirement*"); *see also U.S. v. Cinergy Corp.*, No. 1:99CV1693LJM-VSS, 2005 WL 3018688, at *3 (S.D. Ind. Nov. 9, 2005) (describing demand growth exclusion as "a way of emphasizing, and clarifying, the causation element" of "major modification"). That the Government must prove the element of causation leads inexorably to the conclusion that it bears the burden of proof on the regulatory provision implementing that element.

The Government asserts a new interpretation that would eliminate its burden to prove causation. It asserts Detroit Edison should be required to prove that any post-emissions increase was *not* caused by the change but by other factors. *See, e.g.*, Doc. No. 117 (arguing that the Government should not be required to show that emissions "were *not* excludable," *i.e.*, that the change *caused* the emissions increase). The Government is mistaken. The term "major modification" *includes* a requirement to prove the element of causation. Doc. No. 107 at 8-9 (discussing causation requirement). It is not Detroit Edison's burden to prove the *absence* of it. Likewise, the Government's theory would result in a presumption that any post-emissions increase was caused by the change, a presumption EPA explicitly rejected. 57 Fed. Reg. at 32,327 ("EPA

declines to create a presumption that every emissions increase that follows a change in efficiency is inextricably linked to the efficiency change."). EPA also rejected comments requesting removal of the causation requirement from the rules: "Commenters argued that any post-change emissions increase, regardless of its origin, should subject a source to NSR. However, these arguments ignore the relevant statutory and regulatory modification provisions." *Id.* at 32,327.

The Government's suggestion that courts have "*unanimously*" adopted its position on the burden of proof for the causation element is incorrect. Doc. No. 117 at 5. The courts have squarely put this burden on EPA. *See, e.g.*, *EKPC*, 498 F. Supp. 2d at 995 ("EPA will have to prove that there was a 'modification' — i.e., a physical change that *resulted in* a net emissions increase.") (emphasis added); *U.S. v. Ala. Power Co.*, No. 2:01-CV-152-VEH, 2011 WL 1158037, *4 (N.D. Ala. Mar. 14, 2011) ("[EPA] bear[s] the burden of proving ... that the projects at issue were 'major modifications,' meaning a 'physical change that resulted in a net emissions increase.'"). In *Alabama Power*, the Government failed to meet its burden to prove causation after two of its primary emissions experts—Ranajit Sahu and Robert Koppe —were excluded on *Daubert* grounds, resulting in complete dismissal of the case. *U.S. v. Ala. Power Co.*, No. 2:01-CV-152-VEH, 2011 WL 1158252, *7 (N.D. Ala. Mar. 14, 2011) ("Plaintiffs admitted that, if Sahu and Koppe were excluded, they could not *prove* that net emissions would increase in an amount above the threshold limit *as a result of the modifications at issue.*") (emphasis added).

CONCLUSION

The Government's motion for partial summary judgment should be denied in its entirety.

Respectfully submitted, this 1st day of August 2011.

By: /s/ F. William Brownell
F. William Brownell (bbrownell@hunton.com)
Hunton & Williams LLP | 2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037-1701 | (202) 955-1500

Counsel for Defendants

Matthew J. Lund (P48632)
Pepper Hamilton LLP
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243
lundm@pepperlaw.com
(313) 393-7370

Michael J. Solo (P57092)
Office of the General Counsel
DTE Energy, One Energy Plaza
Detroit, Michigan
solom@dteenergy.com
(313) 235-9512

F. William Brownell
Mark B. Bierbower
Makram B. Jaber
Hunton & Williams LLP
2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037-1701
bbrownell@hunton.com
mbierbower@hunton.com
mjaber@hunton.com
(202) 955-1500

Brent A. Rosser
Hunton & Williams LLP
Bank of America Plaza,Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
brosser@hunton.com
(704) 378-4700

Harry M. Johnson, III
George P. Sibley, III
Hunton & Williams LLP
951 E. Byrd Street
Richmond, Virginia 23219
pjohnson@hunton.com
gsibley@hunton.com
(804) 788-8200

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, the foregoing **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served electronically only on the following attorneys of record in accordance with an agreement reached among the parties:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Email: ellen.christensen@usdoj.gov

James A. Lofton
Thomas Benson
Justin A. Savage
Kristin M. Furrie
James Beers, Jr.
Elias Quinn
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
202-514-5261
Email: thomas.benson@usdoj.gov
justin.savage@usdoj.gov
kristin.furrie@usdoj.gov
jim.lofton@usdoj.gov
james.beers@usdoj.gov
elias.quinn@usdoj.gov

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5646
Email: Holly.Bressett@sierraclub.org

/s/ F. William Brownell

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPENDIX A:
INDEX OF EXHIBITS

Ex. 1	Letter from W. Rosenberg to J. Dingell (June 19, 1991)
Ex. 2	United States' Resp. & Objections to Detroit Edison's First Set of Req. for Admis. (July 13, 2011) (excerpts)
Ex. 3	Transcript of 30(b)(6) Deposition of Michael J. Sewell, *United States v. Ky. Utils. Co.*, No. 5:07-CV-0075-KSF (E.D. Ky. July 10, 2008) (excerpts)
Ex. 4	Supplemental Expert Report of J. Golden (June 3, 2011) (excerpt) - **Filed Under Seal**

EXHIBIT 1
TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1991

OFFICE OF
AIR AND RADIATION

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for enclosing a copy of the September 1990 GAO report entitled "Electricity Supply -- Older Plants' Impact on Reliability and Air Quality" with your October 9, 1990 letter. Your letter raises several questions concerning the impact of older power plants' "life extension" on the reliability of electricity supply. Enclosed are responses to your questions.

If you have any further questions, please do not hesitate to contact us.

Sincerely yours,

William G. Rosenberg
Assistant Administrator
for Air and Radiation

Enclosure

cc: Honorable Charles A. Bowsher
Comptroller General, GAO

Question 1.

Please explain what measures (other than life extensions) will be used to meet "future demand". What will be the role of conservation and new plants?

Response 1.

The role of renewable resources and especially conservation in meeting current demand is significantly higher than 10 years ago, despite regulatory obstacles, inequitable incentives and insufficient research and development support. In fact, few conventional electric generation options can today compete with energy efficiency investment to meet future demand. Recent estimates suggest that energy demand can be halved by 2010 with a savings of over 4300 billion to the U.S. economy.

The cost-competitiveness of conservation and renewable resources will be further increased by the Clean Air Act Amendments of 1990 and assessments of environmental externalities. Preventing significant increments of pollution through energy efficiency can be an important supplement to "end of smokestack/scrubber" technologies.

In addition to lower capital costs, lower financial risks, high reliability and pollution prevention benefits, energy efficiency is achieved by investing in the operation and maintenance of the various energy-consuming sectors of the economy. Any improvements in energy productivity (increasing economic output with stable or declining energy input) will simultaneously enhance national energy security and the international competitiveness of American business. Finally, the development of a competitive "efficiency and renewable resource industry" to compete with such German and Japanese initiatives will be another by-product of this quicker, cheaper, cleaner approach to future demand.

Question 2.

Are such (life) extensions going to be cheaper and less time consuming with the enactment of title I of the Clean Air Act bill, S. 1630? Please explain.

Response 2.

Title I does not have much direct bearing on life extension projects. New source review is only implicated by life extension projects to the extent that they increase emissions and are thus considered modifications under Part C or D. As discussed in the answer to question 5, companies have and use discretion in

project design and permitting to avoid increasing emissions and triggering the modification provisions. However, even if they could not or did not "net out" of new source review, power plant modifications would not face any significantly different treatment under the amendments in SO2 or PM-10 nonattainment areas. Of course, if, due to a SIP call in a nonattainment area the state required the power plants to reduce their emissions, presumably the state would apply such a requirement to existing sources without regard to whether they were undergoing modification. In that case the cost of pollution controls would be attributed to the nonattainment program rather than the new source review program.

In ozone nonattainment areas where major stationary sources of NOx would be required to meet the same requirements as major stationary sources of VOC, under Section 182(f) of the amendments, power plants would be subject to the RACT provisions. Power plants undergoing a covered modification (under the new source review program) would have to achieve LAER instead. Like all major stationary sources in these areas, they would also have to procure offsets at the ratios stipulated for the various nonattainment severity categories. The cost of NOx offsets (if they were required) would thus increase the cost of a modification.

Question 3.

Please discuss in greater detail the "reliability of the electricity supply" from life extensions, taking into account the "different approaches to life extensions" discussed in the GAO report. Is there reason to be concerned about the reliability of these plants in meeting demand? Please explain. If they are not reliable, what are the contingencies?

Response 3.

EPA has not looked into the issue of "reliability of electricity supply" from life extensions.

Question 4.

Do you agree with the demand figures? What are the real and timely alternatives to life extension to meet this anticipated demand?

Response 4.

The demand figures are included in a statement, quoted below, that appears on page 8 of the GAO report.

> The Department of Energy (DOE) and industry experts predict that demand for electricity will increase through the 1990s, outstripping planned additions to generating capacity. In 1989 the nation's total electric generating capacity was about 684,000 megawatts (MW). DOE projects a need for an additional 102,000 MW capacity by the year 2000, and utilities have made plans to construct plants that will produce only about one-third of this additional amount. Also, in 1989 the North American Electric Reliability Council (NERC) projected that utilities' planned additions would be insufficient by 1998. Moreover, according to NERC, some areas of the eastern United States will be at serious risk of supply disruptions in the early 1990s if the demand for electricity reaches the high end of the organization's forecast.

First of all, it is important to note the distinction between the capacity supply and capacity demand estimates. Increase in electric demand (in gigawatts) between 1989 and 2000 refers to the increase in annual peak demand by 2000. Increase in "capacity demand" is defined to include the change in peak demand plus a planning or required reserve margin. The increase in generating capacity needed (or "capacity supply") estimates reflect the difference between current (1989) electric generating capacity estimates (including cogeneration and imports) and future capacity needs (which are assumed to equal the "capacity demand" estimates). Because there is excess capacity in some areas of the country today, the required increase in supply will be less than the forecasted increase in demand. The DOE statement cited by GAO appears to refer to a required increase in capacity supply, and the NERC forecasts refer only to capacity demand (as well as planned capacity additions).

Growth in capacity demand (1989-2000) forecasted by NERC and adjusted for 2000 is about 207 gigawatts, and falls within the range forecasted in the EPA high and low base cases for the new acid rain provisions in the Clean Air Act (about 138-213 gigawatts). EPA agrees with the NERC demand capacity figure.

The increase in generating capacity supply needed (1989-2000) cited by GAO as DOE's forecast is 102 gigawatts. This is less than assumed in the EPA base cases. Note however, according to DOE/EIA "1990 Annual Energy Outlook", the increase in capacity supply needed was forecasted to be 186 gigawatts,

which is in the upper end of the range assumed in the EPA base cases. So EPA is unsure of GAO's statement regarding DOE's forecast of 102 gigawatts.

Question 5.

I am uncertain about this EPA comment as reported by EPA. I can read it several ways, particularly with the word "significantly." What does EPA intend or mean? What is DOE's view? How will WEPCO affect acid rain legislation plants? Please explain. What is the Administration doing to clarify the matter? To what extent is the matter fully in EPA's control? What legal or other challenges are possible or likely? What relevant interpretative rulings has EPA issued or planned? What is their legal effect? How are they helpful? Please consider in your reply the enclosed letter from the National Independent Energy Producers.

Response 5.

Some background on the NSPS and PSD programs and the life extension project at WEPCO's Port Washington, Wisconsin facility, may be helpful to respond to these questions. As noted in the GAO report, Congress dictated that modifications at existing plants be treated as new sources for purposes of the NSPS and PSD (as well as nonattainment new source review) provisions of the Clean Air Act. The Act defines modification as: 1) a physical or operational change that 2) increases emissions. Under the NSPS program, emissions increases are measured in terms of hourly potential emissions, while PSD considers increases in annual actual emissions. EPA's regulations contain several limitations on the broad statutory language, including, for example, an exemption for routine changes.

In addition, EPA regulations contain broad "netting" provisions that enable source owners to offset emissions increases with equivalent reductions and thereby avoid the applicability of new source emissions standards or BACT limits. Under NSPS, netting may occur within the affected facility (e.g., an individual utility boiler) and involve physical restrictions on emissions capabilities (such as addition of pollution control equipment). Under PSD and nonattainment area new source review, netting may occur within the entire plant and may involve operational as well as physical restrictions on the plant's emissions.

Prior to the WEPCO court decision, EPA applied a "current actual" to "future potential" test to all nonroutine changes at existing plants in determining emissions increases under the PSD

bubble rule. That is, EPA assumed initially that following the changes, the plant would operate at its full potential to emit. Source owners could -- and frequently did -- avoid PSD applicability, however, through legally binding physical or operational limitations restricting actual emissions to levels not significantly greater than levels prior to the change. The owner would estimate the source's actual emissions following the change. If the owner projected that the source likely would not increase its actual emissions following the change, it would accept an actual emissions "cap." However, if the projection later proved inaccurate, and the owner desired to increase the source's actual emissions, it would need to obtain a new source permit at that time. As a result of the WEPCO court decision, modifications involving "like-kind" replacements, such as the WEPCO life extension project itself, now will be able to use a "current actual" to "future actual" test for PSD applicability purposes. In essence, this means that EPA, rather than the source owner, is responsible for accurately projecting a plant's actual emissions following a modification to determine whether the plant's emissions are within the bubble. If EPA projects no actual emissions increase, the source's emissions would not be legally capped.

Regarding WEPCO's life extension project, due to age-related deterioration and loss of efficiency, both the physical capability and actual utilization of the WEPCO power plant had greatly declined over time. The project involved the replacement of major internal components at all five of WEPCO's existing coal-fired steam electric boilers at its Port Washington plant. This project would restore the physical and economic viability of the existing powerplant and extend its useful life for approximately 20 years. In its decision regarding WEPCO, EPA determined that the physical changes contemplated by the proposed project were nonroutine in nature and consequently were not categorically excluded from PSD or NSPS modification requirements. As indicated in the GAO report, it is expected that most utility projects will not be similar to the WEPCO situation. That is, EPA believes that most utilities conduct an ongoing maintenance program at existing plants which prevents deterioration of production capacity and utilization levels. To the extent that life extensions at such plants involve only an enhanced maintenance program, new source requirements may not apply for two reasons. First, the life extension may involve no nonroutine physical or operational change. If so, it would be excluded from new source provisions for that reason alone. Even if the life extension did involve nonroutine changes, it still would not trigger new source requirements if it did not increase pollution on an hourly basis (for NSPS purposes) or an annual basis (for PSD and nonattainment new source review purposes). It should also be noted that WEPCO is not a Clean Coal Technology or repowering project, nor is it (1) being implemented to comply with Title IV or any other Clean Air Act requirements, or (2) a

basis (for PSD and nonattainment new source review purposes). It should also be noted that WEPCO is not a Clean Coal Technology or repowering project, nor is it (1) being implemented to comply with Title IV or any other Clean Air Act requirements, or (2) a voluntary pollution control project or research project of any kind. EPA's WEPCO decision only applies to utilities proposing "WEPCO type" changes, i.e., nonroutine replacement that would result in an actual emissions increase. This is the basis for the EPA statement that the ruling is not expected to significantly affect power plant life extension projects.

In addition, it is important to point out that GAO was incorrect in its formulation of the choice that utility companies actually face. GAO stated that the utility company judgment on whether to build a new plant or instead to extend the service life of an existing plant depends on the relative costs of "two sources emitting pollution at a low rate, and not on a comparison of the high cost of a new plant emitting pollution at a low rate and the lower cost of an older plant emitting pollution at a higher rate." In fact, as explained above, due to EPA's netting rules, the owner of an existing source almost always has the choice of merely avoiding increases in emissions at existing plants, and is not required to meet the stringent emissions limits that apply to wholly new sources. Thus, using the nomenclature of the GAO report, the utility's choice is indeed between a new, "lower" emitting plant and an older, "higher" emitting plant. The only condition EPA has ever placed on the latter option is to insist that the source owner prevent the older plant from emitting at even higher levels.

EPA recently proposed a rule (copy enclosed) that would revise the agency's Prevention of Signficant Deterioration (PSD) and nonattainment New Source Review regulations for the addition, replacement or use of pollution control projects (a project undertaken at a utility unit to reduce emission) at existing electric utility steam generating units. Changes that occur at a source that are intended to restore capacity or to improve the operational efficiency of the facility are not considered to be part of a pollution control project for purposes of this proposal. The proposal would not include pollution control projects as modifications, unless the reviewing authority determines that the project will render the unit less environmentally benefirical. Until the proposal is final, EPA will continue its current policy of determining of pollution control projects are excluded from NSR on a case-by-case basis. The implementation of the proposed rule should not cause any negatice environmental effects.

EXHIBIT 2
TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, And NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB, Intervenor-Plaintiffs, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF UNITED STATES OF AMERICA'S RESPONSES AND OBJECTIONS TO DEFENDANTS' FIRST SET OF REQUESTS FOR ADMISSIONS TO PLAINTIFF AND DEFENDANTS' SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO PLAINTIFF

Plaintiff United States of America ("United States" or "Plaintiff"), on behalf of the United States Environmental Protection Agency ("EPA"), submits the following responses and objections to Defendant DTE Energy Company and Detroit Edison Company's (collectively, "Detroit Edison" or "Defendants") First Set of Requests Admissions and Second Set of Interrogatories and Requests for Production:

GENERAL RESPONSES AND OBJECTIONS

1. Plaintiff objects to each instruction, definition, and request to the extent that it purports to impose requirements beyond those contained in the Federal Rules of Civil Procedure, the Local Rules of the Eastern District of Michigan, any Order of the Court, or the Parties'

2. Admit that before 1999, EPA had never determined that the replacement of a pendant reheater triggered New Source Review requirements under the Clean Air Act.

Response: The United States objects to this Request to the extent that it seeks a legal conclusion. The United States objects to this request to the extent that it seeks information covered by the attorney-client, attorney work product, and deliberative process privilege. The United States objects to this request as vague and ambiguous, particularly the use of the term "determined" and "replacement." The United States objects to this request as overly broad and unduly burdensome, particularly as it seeks nearly 30 years of information from thousands of employees. The United States objects to this request as not reasonably calculated to lead to the discovery of admissible evidence. The United States objects to this Request to the extent that it limits its response to prior to 1999, when the activities at issue occurred in 2010. Furthermore, NSR is implemented through a preconstruction review program, and the fact that prior sources may have failed to seek applicability determinations for particular boiler components is irrelevant to whether DTE's replacements triggered NSR. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny whether any of the changes identified in response to this Request and further discussed in response to DTE's related interrogatory specifically involved the pendant reheater section of the boiler.

3. Admit that before 1999, EPA had never determined that the replacement of waterwall tubes triggered New Source Review requirements under the Clean Air Act.

Response: The United States objects to this Request to the extent that it seeks a legal conclusion. The United States objects to this request to the extent that it seeks information covered by the attorney-client, attorney work product, and deliberative process privilege. The

United States objects to this request as vague and ambiguous, particularly the use of the term "determined" and "replacement." The United States objects to this request as not reasonably calculated to lead to the discovery of admissible evidence. The United States objects to this Request to the extent that is limits its response to prior to 1999, when the activities at issue occurred in 2010. Furthermore, NSR is implemented through a preconstruction review program, and the fact that prior sources may have failed to seek applicability determinations for particular boiler components is irrelevant to whether DTE's replacements triggered NSR. The United States has made reasonable inquiry and the information known or readily available to the United States at this time is insufficient to enable it to admit or deny whether any of the changes identified in response to this Request and further discussed in response to DTE's related interrogatory specifically involved the waterwall tubes section of the boiler.

4. Admit that from 1992 to the present, EPA has taken inconsistent public positions with respect to the definition of the term "modification" under the Prevention of Significant Deterioration ("PSD") program.

Response: The United States objects to this request as vague and ambiguous, particularly the use of the terms "inconsistent" and "public positions." The United States admits only that, between 1992 and the present, EPA has undergone various rulemakings related to the term modification. *See, e.g.,* 67 Fed. Reg. 80186 (December 31, 2002); 70 Fed. Reg. (June 10, 2005). The United States further admits that EPA's rulemakings related to the term modification have also undergone various court challenges and, as a result of these challenges, EPA has further modified its rulemakings related to the term "modification." *See, e.g.,* 72 Fed. Reg. 32526 (June 13, 2007). The United States otherwise denies the request.

EXHIBIT 3
TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

---------- x

UNITED STATES OF AMERICA,

PLAINTIFF,

V.

CIVIL ACTION NO. 5:07-CV-0075-KSF

KENTUCKY UTILITIES COMPANY,

DEFENDANT.

---------- x

DEPOSITION FOR THE DEFENDANT
KENTUCKY UTILITIES COMPANY:

The Deposition of Michael James Sewell, 30(b)(6), taken in the above-styled matter at United States Environmental Protection Agency , 109 TW Alexander Drive, Durham, North Carolin a, on the 10th day of July, 2008, beginning at 9 :03 a.m.

Q. Well, let me stop you there, I guess. So is the 3M memorandum -- does it correctly deal with the concept of aggregation?

A. Yes, it does.

Q. So it also deals with the concept of circumvention?

A. Yes.

Q. And how are those two related?

A. Well, circumvention inquiries are usually an after-the-fact inquiry regarding previous decisions that someone has already made about whether typically that multiple projects were not aggregated. And this criteria here is -- the specific criteria listed here is criteria to be used to see if someone actually circumvented, and the timing here is -- the 3M timing is basically -- you know, it's an indicator that you should look further into it if -- if a source files more than one minor source permit application simultaneously or within a short period of time, sort of overlapping type projects. That's just one -- one criteria to the -- for deciding whether circumvention could -- could have occurred.

In our proposed aggregation rule, the main

point there on timing is that there was no presumption that -- that changes being made at the same time, during the same time period, are necessarily dependent on one -- on one or the other. That is not -- you can't draw a conclusion just from that fact. You have to go further and look at the technical and economic factors involved in the specific case. So just the fact that certain changes are being made during the same outage is not -- not conclusionary that those are one project. You continue on your factfinding investigation to -- to make a determination.

Q. Okay. And is that -- does that apply also in the context of what your generator units -- I mean that there's no --

A. Yes.

Q. I want to just mark exhibit -- I guess this will be 197.

[WHEREUPON, document referred to is marked Exhibit 197 for identification.]

Q. And this is quite a thick document. It's dated October 27, 2003. It's the final rule, Prevention of Significant Deterioration and

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, and NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB, Intervenor-Plaintiffs, v. DTE ENERGY COMPANY AND DETROIT EDISON COMPANY, Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FILED UNDER SEAL
CONFIDENTIAL/TRADE SECRET - SUBJECT TO PROTECTIVE ORDER

EXHIBIT 4

Supplemental Expert Report of J. Golden (June 3, 2011) (excerpt)